No. 22,725

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

MARGARET ELIZABETH CLINE, as surviving wife of ROBERT HERRICK CLINE, Deceased; PLATT CLINE, as Guardian of the Estates of Robert Herrick Cline II and Kelly Michael Cline,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF THE APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment against the United States arising out of the death of Robert Herrick Cline, the death allegedly having occurred because of the negligence of Federal Government employees. The action was brought under the Federal Tort Claims Act, 28 U.S.C. 1346. Judgment for the appellee was entered on November 1, 1967, and notice of appeal was filed on December 29, 1967. The jurisdiction of this Court to rule upon

the appeal is found in 28 U.S.C. 1291.

STATEMENT OF THE CASE[1/]

Robert Herrick Cline was drowned on September 1, 1965 in Reservoir No. 1 located within the confines of the Navajo Army Depot. This Depot, located in Coconino County, is twelve miles west of Flagstaff, Arizona. The circumstances of his death are as follows: There was a heavy growth of weeds in the bottom of the small[2/] reservoir which, at the point in question here, was 20 feet deep; and in August 1965 the Depot hired the Magna Corporation of California to eradicate the weeds through the use of chemicals. The small boat which was carrying the chemical tanks capsized, and the tanks sank to the bottom of the reservoir. The Depot then decided to employ a diver to locate the tanks. The Provost Marshal of the Depot contacted the Sheriff of the County, who maintained a Search and Rescue Unit, employed, among other things,[3/] to recover the victims of drownings. He advised that his regular diver was not available. However, he recommended Mr. Cline, the man who

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1/ The Statement of Facts follows the District Court's statement in most particulars. However, where additional details are added, or differences appear, the record or transcript citations will be given.

2/ The reservoir is approximately six acres in size. (Harmon Dep. p. 24.)

3/ The major function of the unit was to find hunters and others lost in the mountains or desert.

had actually organized the scuba diving part of the unit (Tr. 107, 141). Of course, Cline's scuba diving was only an avocation He made his living working for a newspaper chain and at the time of his death was advertising manager for the classified section of the Arizona Daily Sun, of which his father was a publisher.

A Depot official contacted Cline, who agreed to take on the job which he estimated would take but a few minutes (Tr. 58) for a flat fee of $25. The conversation was generally limited to answering Cline's questions about the nature of the tanks which were to be located (Tr. 27). The transaction was handled by the Depot as a contract and the District Court properly found that Cline was an independent contractor, not a servant or employee.

The diving operation was originally scheduled for August 31, 1965, but Cline for personal reasons rescheduled it for the next day, and arrived on September 1 at 2:00 p.m. accompanied by his wife and two children. There were also a number of Depot employees on hand to watch the proceedings (such an aquatic operation apparently being a rather novel event, Tr. 93). The Depot did not have any diving equipment and Cline borrowed a wet suit, two oxygen tanks, a face mask and other equipment from the Sheriff. Mr. Patterson, the senior Depot employee involved in this project, instructed the

foreman of the plumbing maintenance section, Mr. Teninty, to have men available to help Cline, and to provide the equipment necessary, and, in particular, a life line (Tr. 28, 32). The life line originally furnished was too heavy in Cline's judgment and he asked for a lighter line which was furnished. (Tr. 35, Teninty Dep. p. 7, Harmon Dep. p. 15.) The length of the line was not established with certainty. The witness handling the rope was McKissick who estimated its length at 50 feet (Tr. 61).[4/]

The Depot's assistance to Cline in the venture consisted of providing two row boats which were lashed together to make up a landing platform from which Cline could operate. One boat was 12 feet and the other 14 feet long and the longer boat had an outboard motor. (Harmon Dep. pp. 12-13.) A photograph of the platform is in evidence as Plaintiffs' Exhibit 2C. The Depot furnished an anchor which was made out of a piece of 4" lead pipe, 14 inches long, and filled with lead. (Tr. 72, Teninty Dep. p. 12.)

4/ But see Tr. 99, Giles Dep. p. 6, Teninty Dep. p. 7. One item of significance but inconclusive proof relates to the oxygen tanks which Cline borrowed from the Sheriff. The Sheriff stated that tests before the dives indicated a supply of 40 to 45 minutes. (Tr. 120-123.) However, see Bosley Tr. 145-147. Cline himself, according to McKissick, stated after his first dive that he had only five or six minutes of air left, Tr. 102, and that when he came up the third and last time he told Giles he was out of air and in trouble (Giles Dep. p. 9). However, the witnesses agreed that bubbles came up for 10 to 20 minutes, establishing that the tank had an air supply. (Tr. 11, Harmon Dep. p. 39.)

The platform was operated by Earl McKissick, Depot employee, a plumber and steamfitter by trade, employed as a water plant operator, who was experienced in handling motor boats (Tr. 74). Also on the platform was Billy Giles, the employee of the Magna Company who had been present when the Magna tanks were lost.

McKissick maneuvered the platform to the general area where the tanks were thought to be located, marked by a plastic bottle. There was a wind blowing. Cline had dressed in his wet suit and while on the platform adjusted the oxygen tank and then made two brief semi-circular passes in the area, returning to the platform each time to rest. After the second pass Cline put on an extra set of weights, and, upon inquiry by Cline, stated that he could get out of the weights by simply pulling a release. (Giles Dep. pp. 7-8.) Despite Patterson's statement to Cline that by Government regulation he had to wear a life line (Tr. 60)[5/] Cline rejected its use although at one point it appeared that he was ready to slip it on. (Tr. 77, 81, 86, Giles Dep. pp. 8, 16-17, Olson Dep. pp. 14, 24.)[6/] According to McKissick, Cline stated that he wanted to be free of the rope while looking for the tanks, and would use the rope

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5/ In fact, there was no such regulation. Patterson apparently assumed that the practice he was familiar with was regulatory. (Tr. 32, 33.)

6/ Whether Cline used the life line at all is not certain, but immaterial since he did not use it on the fatal dive.

once he had found them and started the work of salvage (Tr. 86, Olson Dep. p. 14) and McKissick assumed that Cline knew what he was doing. (Tr. 105.) On the third dive Cline made a fish-hook turn but shortly returned to the surface 25 to 30 feet from the platform, and in trouble. (Tr. 11, Giles Dep. p. 9, Olson Dep. p. 16.) Giles dove into the water and swam to Cline and attempted to hold him up. McKissick brought the platform to within 10 to 15 feet of the two men floundering in the water, and when nearby threw the safety line to them but the wind interfered. (Tr. 52, Harmon Dep. 35, Olson said 25 feet, Dep. 21 He tried again this time throwing his own life jacket, but again the wind interfered. McKissick, while Giles continued to struggle with Cline, brought the platform over to the men but not in time.[7/] Both men sank, and when Giles came to the surface completely exhausted and alone he clung to the boat and later was taken to shore and given artificial respiration and then taken to a hospital. The rescue operation, prior to Cline's final submersion lasted perhaps five or ten minutes. (Harmon Dep. p. 28.)[8/]

7/ A detailed account of the rescue efforts is set forth herein at pages 28-34.

8/ Aragon said "not too long" Dep. p. 14. Teninty said "it seemed like quite a little while" Dep. p. 18. The Court's statement (R. 221) that Giles released Cline "to save himself", and that thereupon Cline "adjusted his mask, inserted

(continued on page 6A)

8/ (continuation)
his mouthpiece and sank" is without credible support. The only witness who could possibly know Giles' motivations was Giles himself. Giles testified that Cline was frantic and kept taking him under, and that the "last thing I remember they just hung me over the side of the boat. . . and took me ashore." (Giles Dep. pp. 9, 11-12). Giles was then given artificial respiration, and taken to a hospital.

Insofar as the unfortunate Cline is concerned, other witnesses observed him dragging Giles under (Aragon Dep. p. 12, Olson Dep. p. 22) and the statement by the District Court implying that Cline matter-of-factly went to his death, after adjusting his mask is negated by the evidence, and by common sense. If Cline was so poised why didn't he release his weights -- why didn't he swim to the boat -- why did he struggle with his rescuer?

Cline's wife and children were watching from the shore, and Mrs. Cline was pleading with the onlookers to go to her husband's rescue. Mr. Patterson entered the water and swam to the point where Cline had submerged but because of cold and exhaustion could not effect a rescue. Subsequently, four other men including McKissick, employees of the Depot, plunged into the cold water and tried diving for Cline but were unable to reach him because of the cold and the weeds. Cline's body was recovered several hours later by dragging. Cline's widow, and Cline's father, the guardian of Cline's two children, filed suit against the United States contending that the Government had been negligent in conducting the diving operation, and that the Government's negligence was responsible for his death. The Government contended that there was no negligence on its part and that in all events Cline had been guilty of contributory negligence. The District Court found for the plaintiffs and awarded them a total of $389,390.15. This appeal followed.

STATUTES INVOLVED

The Federal Tort Claims Act (28 U.S.C. 1346) provides, in part:

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for . . . personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances

> where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Also see 28 U.S.C. 2674.

SPECIFICATION OF ERROR

1. The District Court in finding that Cline was an amateur scuba diver, and that the Depot was negligent in providing men and equipment to help Cline, and that this negligence caused Cline's death.

2. The District Court erred in finding that the Depot was negligent in attempting the rescue.

3. The District Court erred in finding that Cline was not negligent in the conduct of the maneuvers.

4. The District Court's award was excessive, and its findings re damage do not comply with Rule 52(a), F.R.C.P.

ARGUMENT

Preliminary Statement

The Court has made findings concerning liability, which, if supported by the record, would make this appeal an exercise in futility. But although appellant recognizes the burden placed upon it by Rule 52, F.R.C.P. it is convinced that a careful analysis of the record will disclose that Mr. Cline's death was not due to Government negligence but to his own failure to adhere to fundamental scuba diving safety rules, or, in the alternative, that his death was an accident for which there is no responsibility.

The Court found liability based upon (1) failure of the Depot to provide safe equipment and competent personnel and (2) failure of the Depot personnel as Good Samaritans to adopt reasonably careful rescue tactics and (3) failure of the Depot personnel to exercise without negligence the "last clear chance" to save Mr. Cline.

At the outset we should observe that these three concepts cannot all apply.[9/] Under the Good Samaritan doctrine it is assumed that the rescuer is a "volunteer", and in such a case he owes no duty to the one in trouble to provide adequate equipment or personnel. He is only obliged to use the materials at hand in a reasonably careful manner. Since the Court has found that the Depot neglected its duty to supply competent personnel and adequate equipment, acts and omissions which resulted in Cline's death, there was no reason for the Court to find liability under the Good Samaritan doctrine, other than as a hedge against the rejection by a higher court of the findings of incompetent personnel and inadequate equipment.

Also the "last clear chance" doctrine assumes that a person's own negligence has placed him in danger from which, despite that negligence, he can be extricated by reasonably careful conduct on the part of another. Here too, the rescuer's

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9/ The Court stated that liability was established "on any one or all three bases". (R. 230.)

only responsibility is to use the equipment at hand in a reasonable manner, considering all the circumstances.[10/] The District Court expressly found that Cline was not guilty of any negligence, so again we have an apparent hedge against the possibility of a higher court finding contributory negligence. The District Court's rulings, of course, increase the appellant's burden, but as we expect to demonstrate, the burden is not insuperable.

With this preface, let us examine the findings in some depth.

I

The Finding that the Depot's Negligence Caused Cline's Death is Clearly Erroneous.

The District Court has found that Cline was an inexperienced diver, that his operation was supervised and controlled by the Depot, that the Depot furnished faulty equipment and incompetent tenders to assist him, and that the Depot's negligence in these respects brought about Cline's tragic end. We shall discuss these various conclusions in the order stated.

A. Cline was not an amateur, inexperienced diver, whose operation the Depot undertook to supervise and control.

The Court found (1) that the Depot did not make a thorough inquiry into Cline's qualifications, and (2) that Cline was

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10/ The cases involving the Good Samaritan and Last Clear Chance doctrines are noted infra, pages 25-27.

neither expert nor experienced in scuba diving. (R. 231.) This finding, to appreciate its intended significance, must be considered with the finding that "the Navajo Depot retained or assumed the direction, control and supervision of the recovery operations" (R. 230).

The Court in its opinion does not discuss the significance of these findings, but we presume that the Court is stating that the Depot negligently hired an "amateur" to do a job requiring an expert, instructed the "amateur" how to carry out his function, and that the drowning was caused by the negligence of the Depot in choosing Cline, the "amateur", the inference being that if Cline had been an experienced diver the drowning would not have occurred. We also can infer that it is the Court's conclusion that since Cline was an "amateur" he was not guilty of contributory negligence even though he failed to follow basic safety rules -- since as an "amateur" he couldn't be expected to know what those rules were.

As we shall demonstrate shortly the factual findings are without any credible support -- but first, let us consider the legal implications of these findings. They are without any relevance unless the Court is impliedly finding that the Depot owed a duty to Cline to determine whether he was qualified to perform the job at hand, that the Depot failed to discharge its duty, and that this failure was responsible in whole or in part for Cline's death.

We are unaware of any support for the concept that the Depot had a duty to Cline to protect him from his own incompetence. There was no contractual duty -- the essence of the contract here being merely that for $25 Cline would locate the tanks. This contract carried with it an implied representation by Cline that he was capable of doing the job, but certainly the Depot did not impliedly agree that it would be responsible to him if he lacked the expertise to do the work.

Cline's Experience

With respect to the facts, the appellant does not contend that the Depot "thoroughly" inquired as to Cline's qualifications By that we mean that there is no indication that Depot personnel inquired about his training, his studies, his certificates or the nature and number of his dives. The record does show that Cline was a known member of the scuba diving unit of the Search and Rescue squad of the Sheriff's office (Harmon Dep. pp. 45, 47), and the record does show that Cline was suggested by the Sheriff, and the record does show that in 1962 in the same reservoir Cline had performed some lengthy under water work for the Depot, replacing a valve with the help of a Depot employee named Gonzalez. (Tr. 96, 97, 141, Teninty Dep. p. 14.)[11/] With

11/ The District Court seems to stress this fact implying that the Depot should have made Gonzalez available for the tank recovery (R. 223). But Mr. Patterson did not know Gonzalez was a diver. He was a plumber and steamfitter, who apparently was able to assist Cline in the valve repair, working under 3' of water. He knew something about diving, since he was suited for

(Continued on page 13)

that much established appellant fails to see any significance in the Depot's failure to inquire further into Cline's qualifications.

As to Cline's experience, the finding is only supported by the appellees in this case. Cline's father testified that his son was not an experienced scuba diver, although admitting that his own newspaper published a story to the contrary. The newspaper described young Cline as an "experienced scuba diver who had worked on many rescues in northern Arizona in recent years." (Tr. 174, Dfts. Exh. A.) Furthermore, the elder Cline conceded on cross-examination that he didn't have much knowledge of young Cline's scuba activities (Tr. 176). Cline's wife testified that his experience was limited, and that he had only participated in two search and rescue missions (Tr. 180-181). But this testimony is completely rebutted by disinterested witnesses. The Sheriff testified that Cline represented himself to be an experienced scuba diver; that he consulted Cline about the qualifications of potential members of the unit, that he had the longest period of service of any one in the unit, having organized the unit about eight years before, and that he had been involved in 15 - 20 rescue diving operations (Tr. 107-110,

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11/ (continuation)
the occasion. However, there is no evidence that the presence of Gonzalez would have averted the tragedy. And since Cline knew about Gonzalez, he should have asked for his help if he regarded such help necessary. (Tr. 61, 96-97, Teninty Dep. pp. 4-6).

119). Mr. Shoemaker, a friend of Cline's and member of the rescue unit, testified that Cline had told him that he was a qualified diver and has received training (Tr. 244). Brady, captain of the rescue unit, testified that he considered Cline to be a competent diver (Dep. pp. 4-6). In the face of the testimony of witnesses without any interest in the outcome of the case, and those most likely to know of Cline's qualifications, and considering the newspaper account, we submit that the Court's finding of inexperience is clearly erroneous, and should be disregarded.[12/]

The Depot's Control

Passing now to the issue of control, it is first essential that the relationship of the parties be established, for that relationship will of itself be indicative of the measure of control which existed. The District Court found that Cline was an independent contractor, and this most assuredly was the case (R. 232). It is axiomatic that an independent contractor is responsible for his own safety, and cannot recover damages ordinarily for injuries suffered in the performance of his contract. Dixon v. United States, 296 F. 2d 556 (C.A. 8, 1961); Arizona Binghampton Copper Co. v. Dickson, 195 P. 538 (Ariz.,

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12/ Cline's competence as a swimmer was not challenged (Tr. 175, Olson Dep. p. 19).

1921); Gulf Oil Corp. v. Bivins, 276 F. 2d 753 (C.A. 5, 1960), cert. den. 364 U.S. 835. Similarly, a landlord is not responsibl for injuries to an invitee caused by dangers which are readily apparent. He is only liable for failing to warn of latent or hidden dangers. Clinton Foods, Inc. v. Youngs, 266 F. 2d 116 (C.A. 8, 1959); United States v. Trubow, 214 F. 2d 192 (C.A. 9, 1954). However, where an employer retains control over some aspect of the contract work he is liable for injuries sustained as the result of negligence in exercising such control. Welker v. Kennecott Copper Co., 403 P. 2d 330 (Ariz., 1965).

In the instant case the undenied facts are that the Depot personnel were not familiar with scuba diving[13/] and the hazards connected therewith, whereas Cline was. The further fact is that the Depot personnel had no diving equipment and made no effort to control the diving operation other than to advise Cline that he should wear a safety line, Mr. Patterson, senior representative of the Depot, being under the mistaken impression that this was a regulation. (Tr. 32, 33, 36, 37, 58, 60, 129, 131, Harmon Dep. p. 14, Olson Dep. pp. 10, 11.) Giles was not a Government employee, and was in the platform for the sole purpose of helping find the tanks, and advise concerning their salvage.

13/ Patterson had had some experience with repair of wharfs, bumper and fender logs. (Tr. 32.)

McKissick was a Depot employee familiar with handling of small boats. Neither Giles nor McKissick had any knowledge of scuba diving, and the only suggestion made by either to Cline was to repeat earlier instructions that he wear the safety line, a suggestion which was rejected. (Tr. 74, 81, 82, 90, 100, 101.) In short, Cline was hired as an expert, and was given a completely free hand. In the simple language of McKissick, "I thought he knowed what he was doing." (Tr. 82.) And if the Depot was in control, then it appears that Cline refused to follow directions, and that this refusal cost him his life.[14/]

14/ The District Court seems to assume that the Depot was under some legal obligation to be familiar with and to apply the safety rules with regard to scuba diving as stated by the Navy Diving Manual, and to be informed about the water rescue measures suggested in the American Red Cross Manual. The rule is that employers (and landowners) must take whatever precautions are reasonably required to protect invitees. They are not insurers. Dixon v. United States, supra, Montgomery Ward v. Lamberson, 144 F. 2d 97 (C.A. 9, 1944). We don't believe it is realistic to hold that Depot personnel in Arizona should be versed in Navy Diving techniques, or in the refinements of water rescue suggested by the Red Cross. We submit that in this pond, used as a water supply, and for some boating, the Depot regulations requiring the use of life preservers by boaters was all that could be reasonably required. The Depot could not be expected to know about the problems connected with scuba diving. The Depot plainly was dependent on Cline's expertise; and it is a reasonable conclusion from the record that only Cline could be expected to know the basic safety rules of scuba diving.

B. The Depot was not negligent in furnishing men and equipment to assist Cline.

The District Court has found that the Government was negligent in the following particulars: (R. 232.)

1. In supplying an inadequate unsafe platform.

2. In supplying an inadequate safety line and life jackets.

3. In failing to supply a ring buoy or a knotted or weighted safety line.

4. In supplying an inadequate motor for the platform.

5. In supplying incompetent tenders.

6. In failing to follow reasonable rescue measures.

These acts of negligence are presumably the basis for the Court's finding of liability -- although the Court has not explicitly detailed the single act or omission on which it pegs liability. Therefore, defendant must examine each of the fact findings.

The Equipment

The Court's findings with regard to the equipment might be defensible if this accident had happened on the high seas, and the ship was not equipped with customary life saving equipment. There are many cases in which the courts have held ship's personnel to a high degree of skill in effecting rescue operation And the District Court appears to have placed some reliance on

these cases, having cited Kirincich v. Standard Dredging Co., 15/ 112 F. 2d 163 (C.A. 3, 1940).

But this diving operation did not take place on the high seas, where expertise by ship personnel is obligatory. It took place in Arizona, near Flagstaff, and specifically in what would normally be called a large pond. The Depot people involved were not knowledgeable about scuba diving. Cline was the only one present who was familiar with the equipment and the hazards. Cline saw the equipment being offered, and only made one complaint. He said that the first safety line provided was too big or too rough, and the Depot then supplied

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15/ See fn. 23 infra p. 37. In the Kirincich case the Court quoted from Harris v. Penn. Ry. Co., 50 F. 2d 866, 867 (C.A. 4, 1930) as follows:

> There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete as in that of a sailor upon a vessel at sea. . . If he is taken sick or is injured on board ship, or is cast into the sea by the violence of the elements or by misfortune or negligent conduct, he is completely dependent for care and safety upon such succor as may be given by the members of the crew. By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land. From time immemorial seamen have been called the "wards of admiralty"; and in this country as elsewhere the legislature has enacted an elaborate system of legislation for their protection.

another line. But the motor, the platform, the life jackets were there for him to judge and if they were inadequate or presented any hazard -- he was the only one who could have pointed this out. If he voiced no concern it must be assumed that he was willing to take whatever risk existed. And he made no objection with good reason. There was, in fact, nothing, wrong with the equipment.

The Platform

First, let us take stock of the platform. It is used as a base from which the diver operates. He departs from it, returns to it, rests in it, and it contains whatever equipment and personnel he may need. A platform may or may not be maneuverable. It may be a pier, a float, or a large ship -- or a small vessel.[16/] There is nothing in the record to suggest that one is negligent if one selects a platform which is not capable of easy maneuverability. It may not move at all. And it is not normally expected that a platform will be used to pick up divers. The diver goes to the platform, and not the platform to the diver. The platform used here (see Plf. Exh. 2C) was sufficient for normal purposes. It took the diver

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16/ The only evidence in the record relating to the make-up of a platform is found in the Navy Diving Manual which lists repair ships, salvage vessels, submarine rescue ships, diving barges or floats, shore based diving units, or "suitable small craft". Plf. Exh. 14, p. 86.

to the area to be searched. It gave him a place to rest, and housed his equipment. Although cumbersome and difficult to turn (Tr. 75), it was maneuverable despite the wind for twice it approached Cline in the abortive rescue effort, and on the third run it picked up Giles. If there was a problem, then, it was not with the platform.

The motor was an (4, 7 or 9 horsepower) Evinrude,[17/] was capable of pushing the platform to the area to be searched, and to propel the platform during the rescue efforts. The fact is that in the space of a few minutes (Marshall Tr. 12) McKissick brought the platform on one or more occasions to the critical area, although on each occasion he had to stop the motor, make his throw, then re-start the motor, and maneuver the boats back into position for another attempt. And, as we shall point out later (pp.38-39), the diver's safety is not dependent upon the platform but upon other factors.

The Safety Line

With respect to the inadequacy of the safety line, we conclude that the findings in subparagraphs d and e (R. 232) must be read together:

> d. The emergency equipment provided by the contractee (the safety line and life jackets) were inadequate.
>
> e. No ring buoy, nor weighted nor knotted safety lines were provided by the contractee.

17/ Teninty Dep. p. 13, Patterson Dep. p. 34, McKissick Dep. p. 74.

We construe this to mean that the Depot had a duty to furnish a weighted or knotted safety line or a ring buoy. The Court no doubt has concluded that had the safety line furnished by the Depot been weighted McKissick would have had better luck throwing it to the two men in the water. This is undeniable (although a weighted line might have struck and dazed one of the men), but we believe that the Court has overlooked the fact that a safety line in a diving operation is not intended to be thrown to a diver. He is supposed to tie it to his body, so that he can be pulled to safety in the event of trouble. The Court is really saying that since Cline rejected the normal use of a safety line McKissick should have anticipated that Cline might get into trouble, and should have anticipated that he would have a problem throwing the line to Cline without a weighted end, and should, therefore, have attached a weight. To state the proposition is to answer it. The only one in the operation who could have foreseen such an emergency was Cline -- and he said nothing about the need for a weighted line.

Insofar as a ring buoy is concerned there is no evidence whatsoever to support the finding that failure to furnish the boat with a ring buoy was negligent. The only testimony was that a ring buoy was not provided, and that after the accident

ring buoys were placed around the pond. (Teninty Dep. p. 18.)[18/] The fact is that this pond was not a swimming area, it was filled with weeds and chemicals, and surrounded by barbed wire. (Plfs. Exhs. 2A, 2G.) It was used for boating and the Depot regulations in effect with respect to water hazards required boaters to wear life preservers. (Plfs. Exh. 2F.)[19/] In view of these unchallenged facts certainly ring buoys were unnecessary. The question remains as to whether the employment of a scuba diver required a reasonably prudent employer to foresee that a ring buoy might be necessary.

Again we reiterate at the risk of tedium that this accident occurred in dry country where there is little sophistication about scuba diving and its hazards, and if any one could

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18/ In view of the facts, appellant is at a loss to understand why the Depot placed the buoys there. But we can surmise that fearful management, mindful of the insinuations of counsel in this case, out of sheer nerves, ordered the buoys.

19/ We believe that the Court's finding re the weighted line is based upon its examination of Plaintiffs' Exhibit 15, the American Red Cross Manual, in which a knotted life line is shown on page 191. This line is thrown from the shore and has a range of 35-40 feet, see page 39. It is evident that such a safety line is a substitute for a ring buoy -- an article which is standard equipment for pools and bathing beaches, and is also carried by sea going vessels. (See page 40.) With respect to this article it is stated "The ring buoy now in use, other than on ships, is distinctly a throwing apparatus and requires a special technique and skill for successful use." It is most effective between 45-60 feet. (Page 92.)

or should have foreseen the need for a ring buoy it was Cline himself. A property owner has no duty to foresee and provide for every contingency of which the mind of man can conceive. He is only expected to provide for such hazards as can reasonably be anticipated. On this pond who could anticipate that the diver would not use a safety line provided; that a wind would interfere with the throwing of a rope and a life preserver to a diver; that an experienced diver with air in the tank would sink to his death with no effort to swim to safety etc. etc.

Furthermore, we believe it to be mere conjecture that Cline would have been saved had a ring buoy or knotted rope been available. Giles was not only struggling to save Cline -- he was struggling to save himself. He may or he may not have been able to grab a rope or ring buoy, had one been placed within his immediate grasp. The fact is that the safety rope did fall close to him, but he couldn't disengage himself from Cline in time to grab it. And as the Court has noted McKissick threw in his own life preserver -- but Giles never was able to reach that -- didn't, in fact, even know that it had been thrown. (Giles Dep., p. 20.) Finally, assuming that a rope had reached and been grasped by Giles -- what assurance is there that this would have saved Cline? Cline was in a panic, and Giles was exhausted. A rope or buoy in the hands of Giles wouldn't have prevented either or both of them from submerging.

The "Tenders"

There is no contention that either McKissick or Giles was skilled or even semi-skilled in the art of tending to the needs of divers. McKissick took care of the water plant at the Depot, and Giles was a salesman for the Magna Company. But Cline knew this. No one made any representation to him that the two men were skilled tenders. McKissick went along to maneuver the platform. Giles was there to help locate the tanks, and to give advice as to their handling once found. Again, since only Cline had the experience necessary to determine the qualifications of a tender, it was up to him to assert his needs, or to be deemed to have acquiesced in the risk.

However, there is no evidence or any suggestion by the Court that either the equipment or the tenders caused Cline any trouble until the tragic moment when he rose to the surface calling for help, and the rescue efforts commenced. Then the question arises as to whether inadequate equipment or inexperienced tenders, or both, caused his death. Although the District Court has not given a very strong indication of the specific acts or omissions which it believed responsible for the accidental drowning, it seems very clear that the negligence, if any, occurred during the rescue efforts, and defendant accordingly surmises that the findings of the District Court relating to the rescue effort are the really significant findings. The Court found (R. 233):

> In the attempt at rescue the Depot was negligent in
>
> a. That McKissick failed to maneuver the platform so that it approached Cline from the windward side.
>
> b. That the Army failed to provide a ring buoy, an adequate safety line or other adequate life saving equipment.

First, it should be noted that the specificity concerns (1) the alleged <u>active</u> negligence of McKissick in maneuvering the platform, and (2) the negative act of negligence or omission in failing to furnish the "tenders" with a ring buoy or an adequate safety line (meaning a weighted line). With these observations in mind, let us now consider in detail the rescue effort.

II

The Rescue Operation Was Not Negligently Performed

The Ring Buoy

The District Court's finding that a ring buoy or "adequate" safety line should have been provided has already been considered. However, we should point out that this omission is not relevant to either the Good Samaritan or Last Clear Chance doctrine relied upon by the District Court. For under both doctrines the rescuer's liability only exists for negligent handling of the tools at hand. The Good Samaritan is not liable for failing to provide proper equipment or for the faulty condition of the available equipment, even though its unsatisfactory condition may have been due to the prior negligence of the rescuer. Anderson v. Bingham & Garfield Ry. Co., 214 P. 2d 607 (Utah, 1950); Restatement of Law of Torts, Section 479(c), 47 Yale Law Journal 704; Frank v. United States, 250 F. 2d 178 (C.A. 3, 1957), cert. den. 356 U.S. 952; Owl Drug Co. v. Crandall, 80 P. 2d 952 (Ariz., 1938). In other words, if the Depot personnel were volunteers the condition of the platform, motor, safety line, lack of ring buoys, etc. was of no legal significance. The liability would only exist for negligent handling of such equipment as was available.

The same principle applies to the Last Clear Chance doctrine. See the Restatement of Law, Torts, Section 479:

> A plaintiff who has negligently subjected himself to a risk of harm from defendants subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, . . the defendant is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff. (Emphasis supplied.)

Thus, as under the Good Samaritan rule, if the defendant lacks the means to effect a rescue due to the defective nature of his equipment, he cannot be held. Anderson v. Bingham & Garfield Ry. Co., 214 P. 2d 607 (Utah, 1950). Also see 4 Arizona Law Review 72, 77.

In all events we can, in the present posture of the case, pass by the Good Samaritan doctrine for the Court has failed to find that as a result of the Government's alleged negligence Cline's position was worsened. Such a finding is essential, if the Good Samaritan concept is the basis of liability. United States v. DeVane, 306 F. 2d 182 (C.A. 5, 1962).

This case is unlike United States v. Lawter, 219 F. 2d 559, cited by the District Court, where a helicopter effecting a sea rescue negligently dropped the victim, causing her death. Prior to the rescue effort she had been standing in four feet of water, and in no immediate peril -- hence, as the Court noted the attempted rescue left her in a worse condition than she would have been in, had the rescue been not attempted.

Here, Cline was obviously in immediate danger of drowning; and without the rescue efforts there is no evidence and no reason

to believe he would have been saved. The only persons who could have helped were on shore -- and their efforts did fail. In brief, what could anyone on shore do that Giles did not?[20/]

Then the major issue remaining is whether the failure of McKissick to approach Cline from the windward side was the negligent act which resulted in Cline's death. Before undertaking to examine this critical finding it will be helpful to review the testimony with regard to the rescue efforts. Although in a time of high excitement it is improbable that witnesses will remember the details exactly the same way, the rescue story can be pieced together with reasonable accuracy.

There was a wind blowing from south to north which created ripples or waves on the water. (Tr. 47, 54, Aragon Dep. p. 8, Olson Dep. pp. 11, 12.) The wind was strong enough to push the boat downwind when the motor was off. (Tr. 51, 52, 75.) When Giles surfaced the third time, in distress, he was upwind of the boat. The two men involved in the action, McKissick and Giles (not a Government employee), had this to say, paraphrased:

McKissick

When Cline came up he was hollering for help. He was 20-25 feet from the boat. Giles jumped in the water. I threw the

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20/ The Court below noted that McKissick, Patterson and Aragon tried to rescue Cline -- but it failed to record that also two other Depot employees, Schmidt and Garcia, jumped into the water and tried to save Cline. (Harmon Dep. pp. 38-39; Tr. 12.)

safety line and my own life preserver to Cline, but neither reached him because of the wind. Then I started the motor on the boat, after pulling up the anchor, and the boats were slow. I was told that the safety line had become tangled with the propeller. By the time I got the boat turned around and headed back to Cline, Cline had disappeared. I proceeded to the spot where there were bubbles, and picked up Giles. Then I saw Patterson enter the water and swim out from the shore. I also picked up Patterson. I cut the motor off when I picked up Giles and Patterson. I took Giles and Patterson to the shore -- picked up Aragon, and took him back to the bubbles. Then I dove in. Then I took the boat to the shore, tired and hurt, went to the chlorination plant to warm up -- and to the doctor the next day for an injury (never described). I have had sleepless nights wondering about what I should have done that I didn't -- whether it would have been better to jump overboard also -- I don't know. (Tr. 87-96, 98, 104.)

Giles

After the first pass Cline rested in the boat for about five minutes, said that he was low on air -- said he didn't want to use the other tank because it was low too. After his second pass Cline returned to the boat -- said he needed more weights. He put the weights on himself -- said that there was a release to enable him to drop them off quickly. He re-entered the water,

came up in a few minutes, 25-30 feet from the boat, said that he was out of air -- needed air. I told McKissick to bring the boat over -- then dove in and swam over to Cline. Cline was frantic -- kept fighting me, trying to stay up. I told Cline to release the weights, but Cline did not respond -- kept up his struggle. I tried to release the weights myself but Cline kept pulling me under. I hollered to McKissick to hurry up with the boat as I couldn't last much longer. I also hollered to the people on the shore to help. McKissick hollered that the rope was hung in the propeller.

After McKissick freed the propeller he brought the boat "close", and then threw a line, but it fell six feet short. I told Cline to let go, so I could get the rope but Cline hung on, and by the time I managed to free myself the boat had drifted away. I then returned to hold Cline up. McKissick then brought the boat to me, but by that time Cline had gone under. McKissick took me to shore -- and I was then taken to the base hospital. The over-all event may have taken 8 to 10 minutes. Cline pulled me under about 3 or 4 times. (Dep. pp. 7-12, 19-23.)

Witnesses on the shore varied these accounts in some particulars:

Patterson

McKissick, when the emergency began, started the boat, swung it around, and threw a line. I am not very certain of

the distance but estimate that the boat was 10-15 feet from the two men when McKissick threw the rope into the wind. He started the engine again, repeated the maneuver once or twice. The wind blew the boat north. I jumped into the water after removing much of my clothing and swam out, took the line to the spot where Cline had gone down. I didn't have enough slack in the line to dive, and the boat was drifting away. I think the distance between me and the boat was about 50 feet. I became exhausted and couldn't get into the boat without help. (Tr. 50-56.)

Harmon

When Cline surfaced and hollered to the boys in the boat Giles swam to him, and McKissick started up the motor, brought the boat within 10-15 feet of the men, threw a line to them, after cutting off the motor. The boat then drifted away, McKissick restarted the motor, repeated the operation -- maybe once or twice more. But the boys failed or were unable to grasp the rope -- I don't know whether the rope was short, or to the right or left. Cline, I think, was about 125 feet from the bank. The motor didn't give any unusual trouble -- although McKissick may have been a little nervous. I don't know why McKissick didn't take the boat right up to the two men except for fear of hitting them. I don't know whether Cline was fighting Giles. Several other men made an effort to rescue Cline. One was a Mr. Schmidt, another was Mr. Garcia, and Mr. Aragon -- and then Patterson and McKissick. All were Government employees. (Dep. pp. 27-39.)

Aragon

When Cline surfaced and needed help McKissick threw the rope, which hit Cline but he couldn't get hold of it. Then Giles jumped in and swam to him. Cline grabbed Giles' legs, and was pulling him down, and then McKissick, I think, started the motor, and twice more threw the line when he was pretty close to them. Then I swam out and tried to dive for Cline, after he sank, but was unable to do anything because of the cold water and weeds. Then I went to the hospital, was given coffee and went home. (Dep. pp. 12-15.)

Teninty

Cline surfaced about 15 feet from the boat. Giles jumped into the water in his clothes and life jacket. McKissick started the motor, but the anchor rope got caught in the propeller, and the motor stopped and the boat drifted away. McKissick tried to throw the life line to Cline and Giles but couldn't hit the mark, the breeze blowing the rope back, and I imagine that he was excited. McKissick got the motor started and went back and picked up Giles, who was being pulled under by Cline -- but finally worked himself free. Patterson jumped into the water, and I left to try and start up the weed cutter -- but couldn't start it. When I came back Patterson and Giles were stretched out and were being given artificial respiration. (Dep. pp. 15-19.)

Olson

When Cline surfaced the critical time McKissick started the motor and moved to Cline, and then the motor died, and the boat drifted away and then Giles jumped in to hold Cline up. Although Cline was an expert swimmer he made no attempt at all to swim -- appeared to be helpless. McKissick had trouble with the boat but he maneuvered it over there and threw a rope but Giles had his hands full with Bob (Cline) and the rope either didn't reach him or he didn't see it. So then McKissick tried again with another rope. I guess that when McKissick threw the rope he was about 25 feet from the two men. It seemed to me that the boat was close enough when he threw the rope. Then McKissick moved the boat right to them but both Giles and Cline had gone beneath the surface, and when Giles came up he grabbed the side of the boat completely exhausted. I was about 50-75 feet from where the drowning took place. (Tr. 15-22.)

Marshall

When Cline surfaced 30 feet from the boat McKissick raised the anchor and the boat started drifting away from Cline. Giles dove in and swam to Cline who clutched him for two minutes. McKissick frantically tried to start the engine and after several tries succeeded. He got in the general vicinity of Cline and Giles, stopped the engine, threw a rope -- it fell short and the boat drifted away. McKissick again started the engine, and

again approached the two men, who went under water for brief periods. Again a rope thrown by McKissick failed to reach them. As the boat drifted away Cline sank and Giles swam toward the boat, and clung to the side completely exhausted. McKissick took Giles to the shore, and then brought back Mr. Schmidt who put on the face mask of Cline and tried to dive for him. Patterson, Patrolman Garcia, Aragon and McKissick all made attempts to rescue Cline. I estimate that the air bubbles lasted 10-12 minutes. Patterson and Giles were completely exhausted and received medical attention. (Tr. 11-12.)

Margaret Cline

When my husband bobbed up he told the man in the boat that he was in trouble. Giles swam to Bob. McKissick tried to start the motor, then threw a rope which fell short. Then he started the motor, turned it around, and threw another rope which fell short, and again the boat drifted back. Then Giles yelled that he couldn't hold on much longer, and then Bob looked at me, and went below the surface. The man in the boat was having difficulties When no one went to his rescue I kicked off my shoes and got into the water up to my knees. Bob was still on the surface. Then Patterson raced by, swam out -- became exhausted and they had to pick him up. But for 8-10 minutes while Bob was on the surface no one entered the water. Bob was quite calm in the water. (Tr. 194-199.)

* * * * *

From the record it is clear that when Cline surfaced in trouble, the platform was downwind, that McKissick turned the boat and came directly toward Giles and Cline, stopping 10-15 feet short each time to throw the rope and the life jacket. The defendant concedes that had McKissick maneuvered the boat the long way around -- that is so as to approach the men from the windward side, he might have had less trouble hitting Giles with the rope or jacket. At least that is the necessary assumption on which the Court bases its finding of negligence and causation. But now let us consider the circumstances. Cline surfaced in distress. Giles plunged into the cold water (43 degrees - Tr. 98) to help Cline. What was the reasonable reaction for a man in McKissick's position? The anchor was down. The motor wasn't going. Due to the wind the boat was facing away from Cline and Giles. McKissick had to either pull up the anchor (or it may have been cut by the propeller), start the motor, turn the boat around, and try and pick up the two men struggling in the water. Under these circumstances was it reasonable for the Court to find that McKissick was negligent in failing to approach the two men from the opposite side? This is the real issue in the case. The District Court did not reproach McKissick for not bringing the boat directly to the two men, possibly recognizing the hazard, but it did find that he should have recognized that the wind would interfere with his

heaving of the line and jacket, and that this would result in Cline's death. Appellant submits that McKissick's action of proceeding by the shortest route to the men in the water was reasonable, and that he should not be charged with Cline's death because he failed to realize that Giles could not leave Cline to get the rope or jacket -- which apparently came within a few feet of Giles, but which Giles could not seize because he was too occupied trying to keep Cline afloat. The fact is that McKissick in his desperation to save the two men did not think about upwind or downwind and candidly so stated. (Tr. 96.)[21/] He had had no experience in this area.

The American Red Cross Life Saving and Water Safety Manual (Plf. Exh. 15) is a book of instructions, some pertaining to

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21/ Although McKissick's motivations in stopping the platform, and throwing the line and preserver, before reaching the two men in the water, are not clear -- in fact this decision was sensible for the rather obvious reason that the boat might have struck and injured one or both men, or one or both might have been cut by the rotating propeller. The Red Cross Manual (Plf. Exh. 15) points out (p. 200) that motor boat rescue is hazardous because of the "relatively high speeds at which even the smallest of these operate," and because of the "unguarded propeller operating at high speed". In connection with the operation of the platform in this instance it should not be forgotten that McKissick was alone. He had to operate the boat, lift the anchor, move the boat into position, cut off the motor, get the rope or life preserver, heave it and when the wind moved the boat away, he had to start the motor, maneuver again into position, stop the motor, throw the rope etc. That McKissick in view of the ultimate tragedy might have been more effective had he maneuvered the boat much closer -- taking what risks there were of blows or cuts, is good hindsight. But how was McKissick to know that Cline would disappear within a matter of minutes after he surfaced?

the rescue of drowning persons. The manual advises that when a rescuer is in a boat and is about to attempt the rescue of a drowning person he should, "if it can be remembered" bring the rescue boat on the upwind side of the victim before he dives in so that the craft will drift down within reach of the rescuer when he returns to the surface (p. 196). If persons instructed in such techniques are not always expected to remember this fine point in rescue work, how could McKissick be reasonably expected to prepare for such an emergency.

In an emergency situation, particularly where the rescuers are untrained and almost certain to be laboring under a great strain, the law does not require the same calm rational behavior that can be expected under non-stress circumstances. Baltimore and Ohio Ry. Co. v. Postom, 177 F. 2d 53 (D.C.A., 1949);[22/] Page v. United States, 105 F. Supp. 99 (E.D. La., 1952). In the latter case involving a futile effort by the Coast Guard to rescue a private sloop, the Court said:

> Negligence is the failure to exercise ordinary and reasonable care in the circumstances proved. In appraising the acts of

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22/ In the Baltimore and Ohio RR Co. v. Postom case the Court said, p. 56, "The law makes allowances for the fact that when confronted with a sudden emergency and an immediate peril, some people do not think rapidly or clearly and failure to do so does not constitute negligence as a matter of law."

> the Coast Guard personnel, therefore, it is not enough to sit here in the comfort of our chambers, slide rule in hand, and decide what should have been done. The only way to determine negligence or lack thereof in this case is to place ourselves, in our mind's eye, on the bouncing bow of a 38-footer in squall-ridden Lake Pontchartrain with the wind and sea from the north and the concrete seawall a few feet to the south, and then decide whether or not the acts of the Coast Guard personnel in the circumstances of this case evidenced a lack of ordinary and reasonable care. Paraphrasing the words of the great Greek soldier, Paulus, in addressing the citizenry, some of whom had been complaining of the conduct of the war in Macedonia and offering suggestions as to how it might be better fought: "Let the armchair strategists come with me to Macedonia."

In sum, it is only necessary to establish that the rescuer make reasonable efforts, and be not guilty of affirmative negligence.[23/] Johnson v. United States, 74 F. 2d 703 (C.A. 2, 1935); Cvelich v. Erie Railroad Co., 27 Atl. 2d 616 (N.J., 1942), aff. 29 A. 2d 869.

23/ There are many cases wherein owners of vessels have been found derelict in rescue efforts of seamen or passengers overboard, due to lack of proper equipment or lack of training of crew members. Most of these cases arise under the Jones Act which holds the owner liable for the slightest degree of negligence, due to the hazardous nature of the work, the contract requirements between ship and seamen, and the protection which has from time immemorial been afforded the wards of the admiralty. See Kirincich v. Standard Dredging Co., 112 F. 2d 163 (C.A. 3, 1940); Sadler v. Penn. Ry. Co., 159 F. 2d 784 (C.A. 4, 1947); Harris v. Penn. Ry. Co., 50 F. 2d 866 (C.A. 4, 1931); The G. W. Glenn, 4 F. Supp. 727 (Del., 1933); Grantham v. Quinn Menhaden Fisheries, 344 F. 2d 590 (C.A. 4, 1965); Socony Vacuum v. Smith, 305 U.S. 424 (1939); and Bochantin v. Inland Waterways Corp., 96 F. Supp. 234 (E.D. Mo., 1951); Tompkins v. Pilots Association, 32 F. Supp. 439 (E.D. Pa., 1940).

III

The Tragedy Was Due to Cline's Negligence

The Last Clear Chance doctrine is based upon the circumstance of Cline placing himself in danger by his own negligence. Here, the Court has specifically found that Cline was not negligent (possibly because of his "amateur" status), hence, the Last Clear Chance doctrine is not applicable. However, experienced or not Cline represented himself to be a diver, and he should be held accountable, if he failed to follow standard safety rules for divers, and this precipitated the fatal accident. The record here unequivocally shows that Cline did disregard fundamental safety rules for scuba divers, as follows:

A. Cline should have worn the safety line.

A safety line was available. Cline was pressed by Depot personnel to wear it, but refused.[24/] He plainly felt that it would be a hindrance while he was swimming around looking for the tanks. The importance of a safety line, to a diver, cannot be magnified. The Navy Diving Manual which appellees proffered says (p. 23):

> Use the buddy system even for surface tended divers if at all possible. When the situation dictates that a single diver must make a surface tended dive without a buddy adhere to the following rules:

24/ See Tr. 32, 33, 60, 77, 81, 86, 105, Teninty Dep. p. 13, Giles Dep. pp. 8, 16, 17, Harmon Dep. p. 14, Olson Dep. pp. 10, 11, 14, 24.

a) Secure the tending line around some part of the diver's body (the waist is best).

Cline himself when working in the same pond a few years earlier had refused to work without a safety line, even though he had another man with him (Tr. 135) and he told his wife that it was customary to wear a line any time you are in the water. (Tr. 203.) Another member of the Search and Rescue unit stated the common rule -- if you are diving alone, that is without another diver, you wear a safety line (Tr. 238). Certainly, Cline, an experienced diver knew why a safety line was important -- knew that his life was imperilled without it -- and we submit that his failure to use the line, was negligence. And assuredly the lack of a safety line contributed to his tragic end. One would be hard put to say that a man who leaped from an airplane without a parachute was not guilty of negligence. This is very much the same type of situation.

The District Court in finding that Cline was not negligent in failing to use the safety line relied upon the testimony of a Mr. Van Zandt, a trained scuba diver who stated that in weeds a diver would be handicapped if he made <u>circular</u> passes, since the rope would wind around the weeds, and tire the diver (Tr. 224). In the first place there was no need for Cline to make circular passes in searching for the tanks; and in the second place he didn't make such passes. The District Court found that he made <u>semi-circular</u> passes (R. 220), and the witness most

specific on this point testified that Cline on his first pass went to the west of the platform, on the second pass to the southwest, and on the final pass to the south, making a sort of fishhook turn. (Olson Dep. pp. 14-16.) In the light of the record there is basis for concluding that Cline's rejection of the safety line was justified. It was sheer risk taking.

B. Certainly if a safety line were impractical Cline should not have made his dives without another diver present.

Cline was the only person at the site with knowledge concerning scuba diving and the hazards connected therewith, and it was incumbent upon him to follow the rules which are expected to provide safety during such operations. One such rule is -- don't dive without a buddy diver. (Plfs. Exh. 16, pp. 4, 7.)[25/] Cline told his wife that diving alone was "against everything in

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25/ The Navy Diving Manual states (p. 85):

> Any thorough preparations for diving operation must include provisions for a standby diver or swim buddy depending upon the type of diving apparatus employed. In an operation employing surface supplied diving equipment a stand by diver must be designated. This diver will be dressed to the extent that he can be put into the water almost immediately to go to the aid of the distressed diver. . . The important thing is to visualize an emergency and see if you can get help to the diver in time to be of material assistance.
>
> When self contained diving equipment is being used, the buddy system is a must. There has never been a recorded case of accidental drowning when this system is being used.

scuba diving". (Tr. 201.) Even the appellees' expert, Van Zandt, conceded that the tender should also be a diver, and that he would refuse to dive without a buddy diver. (Tr. 218, 219, 230.) And Mr. Thrailkill, a scuba diver in the same unit as Cline, stated that one positive rule is -- never dive alone. (Tr. 238.) Another member of the Search and Rescue unit testified that the unit held safety meetings once a month, and that it was a rule that dives were not to be made without another diver standing by in case of emergency. (Tr. 245.) The reason for this is plain enough, at least to the diving fraternity. Another diver is familiar with the hazards, with the equipment. He is trained to handle emergencies. He is able to go under water to rescue a trapped or helpless fellow diver. And certainly without a buddy diver present the least Cline should have done for his own protection was to wear a safety line, so that in the event of trouble he could be pulled to safety.

Cline's negligence bars recovery. Campbell v. English, 110 P. 2d 219; Young v. Campbell, 177 P. 19 (Arizona).

IV

The Award of $389,390.15 is Not Supported by Special Findings as Required by Rule 52(a), F.R.C.P., and is Excessive.

With respect to the issue of damage the District Court found, as follows (R. 231-232):

1. Cline was an employee of Hagadone Newspapers, a division of Scripps-Lee Newspaper Publishers, and

was in an executive training program.

2. Cline had a life expectancy of 42.16 years.

3. Cline's average earnings over his life expectancy would be $24,000 per vear.

4. The present value of $6,000 per year for 42.16 years equals $121,684.42.

5. The present value of $24,000 for 42.16 years equals $486,737.68.

6. Twenty per cent for the cost of maintenance of the decedent over the stated period would be $97,347.53.

Based upon these findings the Court entered judgment for ppellees in the sum total of $389,390.15 ($486,737.68 less 97,347.53).

The issues presented with respect to these findings are:

1. Whether they comply with the specificity requirements of Rule 52(a), F.R.C.P.

2. Whether the District Court's failure to deduct from projected gross earnings any amount for income tax was error as a matter of law.

3. Whether the award is excessive.

A. The Findings do not meet the requirements of Rule 52(a) with respect to specificity.

Under Rule 52(a) of the Federal Rules of Civil Procedure, he trial court in non-jury actions, like those brought under he Federal Tort Claims Act, "shall find the facts specially

and state separately its conclusions of law thereon . . ." (emphasis added). The mandate of the Rule is unequivocal, and, consequently, the duty of the district court plain. As has been established in countless decisions, the function of a district court, in an action tried without a jury, is to indicate the essential, subsidiary findings of fact leading to its ultimate conclusions of fact or law. E.g., Kelley v. Everglades District, 319 U.S. 415, 420 (1942); Kweskin v. Finkelstein, 223 F. 2d 677 (C.A. 7, 1955); Maher v. Hendrickson, 188 F. 2d 700 (C.A. 7, 1951); Desch v. United States, 186 F. 2d 623 (C.A. 7, 1951); Dearborn Nat. Casualty Co. v. Consumers Petroleum Co., 164 F. 2d 332 (C.A. 7, 1947).

In Dalehite v. United States, 346 U.S. 15, 24 (1952), fn. 8, the Supreme Court observed in another Tort Claims Act case that "statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied . . . . Otherwise their findings are useless for appellate purposes". While this emphasis on the adequacy of findings for appellate review has been made by every court interpreting the purposes of Rule 52(a), that emphasis has not been restricted to the question of whether the specificity of findings is sufficient to allow the appellate tribunal to make an intelligent appraisal of the bases for the district court's decision. As observed by the Eighth Circuit in Michener v. United States, 177 F. 2d 422 (C.A. 8), there is also implicit

the vital purpose of sparing the appellate court the necessity of searching the record in order to supply findings of fact for the trial judge, a function, in any event, for which an appellate tribunal is unsuited.

These considerations are as appropriate to the question of damages as to that of liability. Rule 52(a), of course, draws no distinction between the two, and its requirement, in express terms, is equally applicable to both. And the courts have long recognized the need for particularization of the factual bases for damage awards. Thus, in another recent Tort Claims Act case, the Supreme Court held that "it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed." Hatahley v. United States, 351 U.S. 173, 182 (1956).

It is true that some Courts of Appeals have not held the District Court to specifity with regard to damages. See, e.g., Sanders v. Leech, 158 F. 2d 486 (C.A. 5, 1946); United States v. Pendergrast, 241 F. 2d 687 (C.A. 4, 1957). But these decisions fail to adhere to the express mandate of specificity in Rule 52(a), nullify the purposes behind the Rule's broad requirement, and are in conflict with the recent pronouncement of the Supreme Court in Hatahley v. United States, supra. Moreover, the rule of specificity has been accepted by many other recent Court of Appeals decisions. See e.g., Major Appliance Co. v. Gibson

Refrigerator Sales Corp., 254 F. 2d 497, 502 (C.A. 5, 1958); O'Connor v. United States, 251 F. 2d 939, 943 (C.A. 2, 1958); United States v. Rife Construction Co. & Assoc., 233 F. 2d 789, 790 (C.A. 5, 1956); National Popsicle Corp. v. Icyclair, 119 F. 2d 799 (C.A. 9, 1941); S. S. Silberblatt, Inc. v. United States, 353 F. 2d 545 (C.A. 5, 1965).

In the Ninth Circuit this Court has repeatedly ruled that findings of fact must be sufficiently detailed to enable the appellate court to determine the grounds upon which the trial court based its decision. National Lead Co. v. Western Lead Products Co., 291 F. 2d 447 (1961); Dale Benz Inc. Contractors v. American Casualty Co., 303 F. 2d 80 (1962). This Court said Irish v. United States, 225 F. 2d 3, 8 (1955): Under Rule 52(a) the "findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision . . ."

The District Court's ultimate conclusion that Cline would have earned an average of $24,000 a year over his life time, which is the basis for the amount of the judgment entered by the District Court, is not supported by any evidentiary findings of any description other than the fact that he was in a corporate training program. With such a bare unsupported conclusion before it how can this Court effectively review the finding? There is not even a hint as to the District Court's basis for its ultimate conclusion.

Even were this Court of a mind to search the record for support, it would be a fruitless effort. There is no method of establishing the formula used by the District Court. The admitted fact is that Cline was making $7,800 per annum at the time of his death. There is also testimony by a newspaper associate of Cline's father, a plaintiff herein, that it was their goal that young Cline would "ultimately" take over his father's job as publisher of the Arizona Daily Sun. (Tr. 150.) Young Cline was classified advertising manager of the Sun, but was slated to go to Coeur D'Alene, Idaho to become assistant advertising manager. This was a promotion, and he would get $9,000 to $10,000. In three to five years if he continued to make progress he could become a publisher at $17,000 a year, and in two or three years he could make $20,000 or more. And with "a number of years under his belt . . . he should progress up to the $30,000 range." The salary of the publisher (Cline's father) is pretty close to $30,000.

A reading of young Mr. Hagadone's testimony (he was in his early thirties) will reveal how uncertain this time and progress schedule was.

Appellant recognizes that the District Court could have accepted, and probably did, every speculation young Mr. Hagadone proffered; but the appellant and this Court is entitled to know how, on the basis of this testimony, the Court concluded that

the average salary of Mr. Cline would have been $24,000 per year.[26/] Otherwise, Rule 52(a) is without any teeth.[27/]

B. The District Court committed error in failing to make a deduction from gross earnings for federal income taxes.

It would be idle to pretend that the Court's failure to take federal income taxes into account is without judicial support. This particular problem has plagued many courts for years -- and the results have been less than harmonious, although as this Court will note the modern trend appears to require an income tax deduction.

The Second Circuit has had occasion to rule on this issue, on numerous occasions, and some of its decisions have been frequently cited by other courts. Hence, a brief resume of the principal cases there decided may be helpful.

In 1944 in Stokes v. United Airlines, 144 F. 2d 82, the Court had before it the claim of an injured seaman, and the Court said, "We see no error in the refusal to make a deduction for income taxes in the estimate of libelant's expected earnings;

26/ Whether a high school graduate, who appears to have dropped out of college after a few months, and who graduated 82nd in a class of 150 when attending a Navy school for seamen would qualify to publish a newspaper, and would rise quickly to such a position, is subject to some doubt. (Tr. 165, Plfs. Exh. 12.)

27/ On the subject of unsupported conclusions re damages see O'Connor v. United States, supra.

such deductions are too conjectural." (Emphasis supplied.) This reasoning has been followed in many jurisdictions (see 63 ALR 2d 1393, and Federal Income Tax Consequences of Tort Recovery, Intramural Law Review of March, 1968). But in 1959 the same Circuit came to a different conclusion in O'Connor v. United States, 269 F. 2d 578. However, in the following year the celebrated case of McWeeney v. New York, New Haven, Hartford RR Co., 282 F. 2d 34 was decided. There a railroad brakeman earning about $4,800 per annum was injured. He was a bachelor, age 36, and the question came up as to whether allowances for future lost earnings should be reduced by the estimated income tax. The Court said (p. 38) "There may be cases where failure to make some adjustment for the portion of a plaintiff's or decedent's earnings that would have been taken by income taxes would produce an improper result; but these are at the opposite end of the income spectrum from McWeeney's. For example, if a plaintiff or a plaintiff's decedent, had potential earnings of $100,000 a year, more than half of which would have been consumed by income taxes, an award of damages based on gross earnings would be plainly excessive even after taking full account of the countervailing factors we have mentioned. We find it hard to believe that juries would render such a verdict even in the absence of instruction; but in this limited class of cases the court may properly give some charge or, perhaps better, use the

tools provided by Fed. R. Civ. Proc. 49, and an excessive verdict may always be set aside. In such cases, which in proportion are relatively few, the criticism that the whole process of computation is unrealistic has a considerable measure of validity . . . Such cases are in sharp contrast to the great mass of litigation at the lower or middle reach of the income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and, for the reasons indicated, plaintiff is almost certain to be under compensated for loss of earning power in any event." In short, the Court held that income taxes would not be taken into account if the earnings of the injured person or decedent were "not clearly above the middle reach of the income scale." The Court left few hints as to what would be considered above "the middle income" scale. Chief Judge Lumbard wrote a vigorous dissent, joined by Judge Moore.

The McWeeney ruling has been adhered to by the Second Circuit. In Montellier v. United States, 315 F. 2d 180 (1963) earnings of $12,000 a year were held not to be above the middle reach of the income scale. In Cunningham v. Redieret Vindeggen A.S., 333 F. 2d 308 (1964) the Court reversed a district court because in calculating damages in a case involving the death of a seaman the lower court reduced the amount awarded by estimating income tax liabilities. Judge Moore sharply dissented. In

LeRoy v. Sabena Belgian World Airlines, 344 F. 2d 266 (1965) the Court said with respect to an average projected income of $16,000 per year "Certainly the risk that the federal and New York governments will cease to take a substantial portion of a $16,000 income is one of the smaller uncertainties involved in the computations in this case, and the 15% estimate of Judge Murphy is a reasonable estimate of what the portion would probably be." In Petition of Marina Mercante Nicaraguense S.A., 364 F. 2d 118 (1966), cert. denied 385 U.S. 1005, the Court found that earnings of $16,000 and $25,000 were sufficiently high to require income taxes to be taken into account.

Other Circuits do not follow a consistent pattern. The First Circuit recently had before it the death of a railroad employee making a modest wage of about $9,200 per year. The Court ruled out evidence of income tax, following the Stokes case in the Second Circuit. Boston and Maine Ry. Co. v. Talbert, 360 F. 2d 286 (1966). The Eighth Circuit reached a similar result. Chicago & N. W. Ry. Co. v. Curl, 178 F. 2d 497 (1949).

The Seventh Circuit required an income tax deduction in a case involving a projected income of $15,000 to $20,000, stating "This is a case where the impact of the income tax has a significant and substantial effect on the computation of probable future contributions and may not be ignored. While mathematical certainty is not possible, any more than it is in a prognosis of life expectancy and probable future earnings, nevertheless,

an estimate may be made based generally on current rates, from which there should be computed the future income of the deceased after payment of Federal Income Taxes rather than before." Cox v. Northwest Airlines, 379 F. 2d 893, 896 (1967). Also see Wetherbee v. Elgin, Joliet and Eastern Ry. Co., 191 F. 2d 302 (C.A. 7, 1951), cert. denied 346 U.S. 867 and 928.

In a case in the Tenth Circuit a flight engineer and co-pilot were lost in an air crash accident. One earned about $10,000 a year and the other about $11,000 -- although the Court found that shortly the co-pilot would have been earning $22,500 per year. The Court upheld the action of the District Court in making a deduction for income taxes, United States v. Sommers, 351 F. 2d 354 (1965), stating "No doubt the income available to survivors would be after income taxes are withheld. However, there is little agreement to be found in the reported cases regarding the application of possible income tax liability to damage awards based upon the prospective earnings of a deceased or injured person. (Citing the Montellier, McWeeney and O'Connor cases) . . . When dealing with such an imprecise and speculative subject the best that can be hoped for is reasonableness . . . In this case it seems that the court reached a fair and adequate result by using the best method it could devise to fit the situation. We cannot say that the result was anything but reasonable."

In this (Ninth) Circuit the issue has been before the Court on several occasions. In Southern Pacific Ry. Co. v. Guthrie, 180 F. 2d 295 (1951), the jury awarded the plaintiff $100,000 for injuries sustained which caused lost earnings as well as pain and suffering. The plaintiff argued that the rule in the Stokes case should be followed, with no deduction from gross earnings for federal income tax. This Court in response said (p. 302), "We think, however, that for the expected period of Guthrie's life, he would have found taxes fully as certain as his prospect of continued earnings." However, the Court ruled that the award was not so excessive as to constitute a denial of a motion for a new trial an abuse of discretion. On rehearing en banc, reported at 186 F. 2d 926, cert. denied 341 U.S. 904, the Court again adhered to the proposition that the actual loss was "net take home pay" (p. 927), but stated that it could not determine what that figure was, and also stated that "we find nothing to show that the court . . . ignored the income tax deductions" (p. 932). The judgment was affirmed.

In 1963 in Nollenberger, et al. v. United Airlines, Inc., 216 F. Supp. 734 (C.D. Calif., 1963) the District Court allowed an income tax deduction. This decision was not reversed on appeal. See 335 F. 2d 379, c. dis. 379 U.S. 951. It is worth noting that both the Sommers case mentioned above, and the Nollenberger case arose out of the same air crash in the vicinity

of Las Vegas, Nevada. The applicable Nevada statute (N.R.S. 1958, Section 41.090) provided for "such damages, pecuniary and exemplary, as shall be deemed fair and just". And both the Ninth and Tenth Circuits permitted income tax deductions under this statute. In the more recent case of Furumizo v. United States, 381 F.2d 965 (1965) this Court affirmed a District Court ruling that under the Hawaiian law requiring "fair and just" compensation the so-called "minority rule . . . is the more modern and reasonable one (which) holds that such estimated taxes should be deducted from the total estimated loss of earnings." There, the decedent had earnings of approximately $6,500 per year.

This brings us to another recent case, United States v. Becker, 378 F.2d 319 (Arizona, 1967) which appears to arrive at a contrary conclusion, and which appellant must overcome. In that case the decedent was a passenger in an airplane engaged in scouting a forest fire. The Court ruled that the pilot was a Government employee and awarded the plaintiff $322,955, finding that Becker's income would have been "at least" $15,000 per year. In regard to the matter at issue the Court very briefly stated "The indications are that under the law of Arizona the incident of income tax has no part in arriving at a damage award. See Mitchell v. Emblade, 298 P.2d 1034, 1037, adhered to in 301 P.2d 1032, and cases cited therein."

In the Mitchell case the issue was whether the District Court in instructing the jury should explicitly point out that

damages for medical pain and suffering were not subject to income taxes. The Supreme Court of Arizona, in accordance with the majority rule in this country, held that such an instruction would be improper. Appellant does not challenge this rule. Such an instruction could be interpreted by a jury as a suggestion by the Court that the damage verdict should be reduced somewhat.

But that fact situation does not confront this Court. Here (as in the Becker case) the issue is whether in determining the income lost to a family by reason of the death of the breadwinner the Court should take into account the income taxes which the decedent would have had to pay, had he lived and earned the amount determined by the Court, in this case $24,000 per annum. Under Arizona law damages in a wrongful death case is to be "fair and just", and the Arizona Supreme Court has determined that the verdict is to be limited to "probable accumulations". Andersen v. Binghampton and Garfield Ry. Co., supra. There can be no doubt that the salary earned by Cline would have been subject to significant income taxes, and that the entire gross earnings would not have been "accumulated" for the benefit of himself or his family.

When this Court in the Becker case used the language, "The indications are" etc. it seems reasonable to conclude that this Court was not free from doubt as to the significance of the Mitchell decision; and we respectfully urge the Court to re-examine the Mitchell case, particularly in the light of its later

Furumizo decision. Arizona law provides for damages which are "fair and just" (A.R.S. 12.613). Hawaiian law calls for "fair and just" compensation (R.L.H. 1955, Section 246-2). Nevada law also provides for damages which are fair and just. Despite the evident similarity of the statutes this Court appears to have reached inconsistent conclusions as to their intendment. Of course, the appellant concedes that local courts may construe similar statutes differently, but appellant submits that in the absence of rather solid proof that such contrary interpretations have been reached, this Court should make every reasonable effort to give similar meanings to similar language.[28/]

28/ The most recent case on the subject of which appellant is aware is Nancy Brooks v. United States, 273 F. Supp. 619 (S.C., 1967). There Judge Russell made an exhaustive review of the cases and other authorities, and stated (p. 628):

> The argument in favor of the (income tax) deduction is compelling. The beneficiaries of an action such as this are only entitled to recover the amount of their actual loss. If the deceased had lived, his future earnings would have been subject to income taxes and the amount available for those entitled to support from him would have been after taxes. However, damages awarded for wrongful death, so far as they encompass prospective earnings, are non-taxable. Unless such damages take income taxes into consideration, the beneficiaries will accordingly be receiving more than they would have had the deceased lived. Accordingly, 2 Harper and James, The Law of Torts, Section 25.12 sums the matter up: "The argument for computing damages on estimated income after taxes is a clear one; this will measure the actual loss. If plaintiff gets, in tax free damages, an amount on which he would have had to pay taxes if he had gotten it as wages, then plaintiff is getting more than he lost."

(continued on page 56)

This issue is constantly recurring and is of manifest importance. Defendant believes that reason and justice call upon the courts to take a realistic approach to the issue of damages -- and to accept the obvious fact, especially in cases involving large earnings, that income taxes would take a large bite from the projected earnings. To fail to give effect to this fact is to work an injustice to defendants in tort cases.

28/ (continuation)
However in footnote 17, p. 31, he said: "The majority view seems to be against deductibility (Annotation, 63 A.L.R. 2d 1393) but the "modern trend" appears definitely in the opposite direction. Furumizo v. United States (D.C. Hawaii, 1965) 245 F. Supp. 981, 1014."

Judge Russell finding no definitive pronouncement on the subject by the Supreme Court of South Carolina, concluded (p. 632):

> Free thus to follow the commands of reasonable justice, I am of the opinion that the arguments for considering such income tax consequences in a death case (as distinguished from a personal injury case) are so logical and compelling, especially in a non jury case, that a reasonable deduction from prospective earnings on account of income taxes should be made in this case.

Appellant also notes that the Arizona statute mentioned above calls for fair and just damages "having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default." (Emphasis supplied.) In this case appellant believes that even if the District Court were correct in finding some fault with the Depot's rescue efforts, the undeniable fact is that there was no wilful fault -- each man concerned did the best he could to save young Cline, and these circumstances, appellant submits, are "mitigating". In any event, appellant submits that the findings of the District Court should have indicated whether the Court took into account this express statutory mandate.

In view of the deficiencies noted, if this Court should find Depot negligence which caused Cline's death, we submit that the matter of damages should be remanded to the District Court for further consideration.

C. In view of the above, the award, appellant submits, is grossly excessive.

CONCLUSION

Cline, a scuba diver, having elected not to use a safety line, came to the surface in great distress. Several men made every effort to save his life. In the process, Cline, who was frantic, did not, despite Giles' plea, release the heavy weights around his middle, and Cline kept pulling Giles under. McKissick

on two or more occasions brought the boat close to the two men, and threw a rope which fell a few feet short or to one side of Giles. Giles was unable to reach the rope due to his efforts to help Cline stay afloat, and minutes after the tragedy commenced Cline drowned. To hold the Depot responsible for this tragic accident is manifestly unfair. The drowning was due chiefly to the lack of a safety rope on Cline, in violation of the basic rules of scuba diving, and insofar as the Depot is concerned, the drowning was an accident for which it should not be held accountable.

We have every sympathy for the widow and her children, but we believe it to have been egregious error for the District Court to have made a public record that Depot personnel were responsible for Cline's death.

Appellant respectfully submits the decision of the District Court should be reversed, or in any event, the case should be remanded to the District Court for appropriate special findings as to damage.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Carl Eardley

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AFFIDAVIT OF SERVICE

WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

CARL EARDLEY, being duly sworn, deposes and says:

That on July 17, 1968, he caused three copies of the foregoing Brief of the Appellant to be served by air mail, postage prepaid, upon counsel for appellees:

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Subscribed and sworn to before me
this 17th day of July, 1968.

Audrey Anne Crump
Audrey Anne Crump
Notary Public

My Commission expires August 31, 1971.